**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

| | |
|---|---|
| FRONTIER COMMUNICATIONS CORPORATION<br><br>and<br><br>COMMUNICATIONS WORKERS OF AMERICA, DISTRICT 2-13 | Case No. 09-CA-247015 |

# CHARGING PARTY'S ANSWERING BRIEF TO RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS

**TABLE OF CONTENTS**

## I. INTRODUCTION

The Communications Workers of America, District 2-13 joins with and incorporates by reference Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision, which was filed on January 15, 2021. The basic facts of this case are not in dispute: Frontier admits that it refused to provide the information identified in paragraph 6(b) of the Complaint and failed to notify or bargain with the Union over the effects of its implementation of the I-9 Advantage system, including its discretionary Form I-9 reverification process, which affected nearly the entire bargaining unit. Instead, Frontier challenges the Union's right to bargain over this reverification process and its right to request information relevant to that bargaining obligation.

Among the arguments it marshals to its cause, Frontier asserts that compliance with federal immigration law is not a bargainable subject. This is a distraction—an attempt to shift focus away from the Union's well-settled right to bargain over the effects of Frontier's implementation of the I-9 Advantage compliance software system on bargaining-unit employees' terms and conditions of employment. The Administrative Law Judge properly found that the reverification process was a material and substantial change affecting bargaining-unit employees. Frontier shifted the substantial compliance burden associated with locating and presenting verification documents onto the affected employees and made compliance with the reverification process a condition of their continued employment. These were serious consequences that materially affected the bargaining unit. Nor has Frontier properly raised or adequately supported other defenses, such as undue burden or impossibility, that it now asserts.

Finally, the Administrative Law Judge properly found that the Union is entitled to receive the information it requested as part of an appropriate remedy. The information the Union sought in was either presumptively relevant or clearly connected to the Union's attempt bargain over the

effects of the I-9 Advantage implementation. Frontier has not met its burden to show that the information is no longer needed, and the information sought remains relevant to potential bargaining over ongoing Form I-9 reverification requirements and the Union's persistent concerns about the security of unit employees' sensitive information. The Union therefore urges the Board to affirm and adopt the Decision on review.

## II. ARGUMENT

### A. The Administrative Law Judge correctly found that Frontier was required to bargain over the effects of its Form I-9 re-submission process.

Frontier's 2019 reverification process was a bargainable effect of its I-9 Advantage compliance system implementation. Much of Frontier's evidence at the hearing was directed towards establishing that compliance with federal immigration laws is not a bargainable decision. This is not in dispute—like any other employer, Frontier is required to complete and maintain a Form I-9 for every employee. But the requirement to comply with federal immigration law does not excuse Frontier's refusal to bargain over the scope and circumstances of the reverification process; indeed, Frontier's Senior Vice President for Labor Relations, Robert Costagliola, acknowledged that subjects governed by federal law, such as pay rates, may also be mandatory subjects of bargaining. (Tr. 222–23)[1]

The Union does not argue here that Frontier was required to bargain over the decision to adopt the I-9 Advantage system itself.[2] But while the adoption of the I-9 Advantage is not

[1] References are denoted as follows: to the transcript of the hearing by "Tr."; to the Administrative Law Judge's Decision by "ALJD," to the Joint Exhibits by "JX," to the General Counsel's Exhibits by "GCX," to the Employer's Exhibits by "RX," to Frontier's Brief in Support of Exceptions by "Exc. Br.," to the General Counsel's Answering Brief by "GC Br.," followed by page and line numbers, as appropriate.

[2] The unfair labor practice charge in this case alleges in relevant part that Frontier failed to bargain in good faith by "failing to provide notice and an opportunity to bargain over the effects of its implementation of Form I-9 software." GCX 1(a). At the hearing in this matter, the Administrative Law Judge sustained Frontier's objection to the litigation of any bargaining obligation it may have had with respect to the decision to adopt the I-9 Advantage system as being beyond the scope of the allegations set forth in the charge document and the Complaint. (Tr. 68)

alleged to be a bargainable subject in this case, the Board should not lose sight of the significant distinction between Frontier's mandatory compliance with the IRCA, on the one hand, and its wholly discretionary selection of the I-9 Advantage compliance-management system, on the other. Frontier conflates these two distinct issues in arguing that its I-9 Advantage rollout was mandated by law. The Administrative Law Judge appropriately considered this distinction in finding that Frontier was required to bargain over the effects of its compliance program. (ALJD at 19:4–36)

Once Frontier decided on the I-9 Advantage system, it was obligated to afford the Union notice and an opportunity to bargain over the effects of that decision *before* it was implemented,. *See, e.g., Good Samaritan Hospital*, 335 NLRB 901, 902 (2001); *accord Tramont Mfg.*, 369 NLRB No. 136, slip op. at 5 n.7 (Jul. 27, 2020) (*Tramont III*) (citations omitted). This included bargaining over the time allowed to present work documents and other elements of the compliance process not dictated by federal immigration law. *See Washington Beef, Inc.*, 328 NLRB 612, 620 (1999). The Administrative Law Judge properly found that the Union "had a valid interest in bargaining to . . . explore options for reducing or avoiding the impact of the new I-9 form requirement would have on employees." (ALJD at 18)

Frontier argues that requiring employees to reverify their immigration status was part-and-parcel of its decision to implement the I-9 Advantage system, and that the Union therefore did not have the right to bargain over the reverification process or any details of its implementation. (Exc. Br. 13–16) But this argument effaces the important and longstanding distinction between decisional bargaining and effects bargaining, which is exemplified by the Board's oft-cited decision in *Litton Financial Printing*, 286 NLRB 817 (1987).

In *Litton*, the company decided to discontinue its cold-type printing process and to convert its plant to an entirely hot-type operation. 286 NLRB at 817. It embarked upon implementation of this decision, transferring its cold-type work to other plants, and purchasing additional hot-type equipment. It then laid off approximately one-fourth of its workforce, including several employees who worked exclusively on the discontinued process, without prior notice to the union. The union requested bargaining over both the decision to lay off employees and its effects. *Id.* at 817–18. The company agreed to bargain over the effects of the layoff but refused to bargain over the layoff decision itself. *Id.* at 818.

The General Counsel argued in *Litton* that the layoff was an effect of the decision to convert the production line, and that the union was therefore entitled to bargain over both the effects of the layoff and the layoff itself. 286 NLRB at 819–20. The administrative law judge refused to find an obligation to bargain over the layoff in part because, he believed, any such bargaining "would undoubtedly . . . call into question the rationale underlying the plant conversion itself." The Board disagreed, finding the layoff was a bargainable effect of the conversion decision. *Id.* at 820. In so finding, the Board observed that layoffs were not the "inevitable" or "natural consequence of the decision to convert the plant's operations," and rejected the judge's pre-determination that any negotiations would be "fruitless." *Id.*

*Litton* requires that the Board draw a careful distinction between a non-bargainable technology change, on the one hand, and the bargainable effects of that change on employees' terms on conditions, on the other. Although the General Counsel does not challenge Frontier's right to adopt the I-9 Advantage system, Frontier has offered no evidence about that system or

Frontier's regulatory obligations showing that the reverification process at issue here was a natural or inevitable consequence of its adoption.[3]

Just as the union in *Litton* was entitled to bargain over the effects of a technology change, including the possibility to avoid layoffs in part or in full, here the Union should have been afforded an opportunity to bargain over the effects of the I-9 Advantage implementation. This would have permitted the Union to explore avenues for meeting Frontier's compliance goals that did not shift the compliance burden onto the bargaining unit through a wholesale reverification process and the associated threats of discharge. Effects bargaining would also have allowed the Union to negotiate adequate safeguards to protect unit employees' sensitive information contained in their verification documents—both those being presented during the current reverification and the copies retained from the Company-wide reverification in 2013.

Indeed, the course of dealing between the parties during the 2013 reverification shows how the process could have played out here. In 2013, the Employer conducted a broad I-9 reverification after it consolidated its personnel files from its field offices. (JX 5; ALJD at 3–4) The Union demanded bargaining over the reverification process and filed an unfair labor practice charge, which was withdrawn in relevant part after the Employer came to the table. (Tr. 39–40) The Employer agreed to discuss effects of the reverification decision including such subjects as the time allowed employees to provide the required documentation, specific documentation issues, and similar concerns. (Tr. 230:7–8; RX 1) Frontier Senior Vice President for Labor Relations Robert Costagliola, who testified at the hearing and was involved in the 2013 bargaining, considered this discussion to be a "reasonable approach." (Tr. 231:18–25) Once

[3] At the hearing in this matter, Frontier suggested that an audit had disclosed "massive noncompliance," but Ms. Perry credibly testified that she was not informed of the existence of such an audit or provided with any report documenting its results. (Tr. 108, 152) Nor has Frontier explained why it was unable to upload existing documents into the I-9 Advantage system.

bargaining began, with the Employer and the Union "working together," (Tr. 188:12) it took only a day to resolve this issue. (Tr. 88:4–8) Yet the Company abandoned this proven approach in the 2019 reverification.

**1. The Union's request to bargain in response to Frontier's surprise implementation of I-9 Advantage reasonably encompassed effects bargaining.**

The Union joins Counsel for the General Counsel's argument that the Form I-9 reverification was presented as a *fait accompli*, and that the Union therefore did not waive effects bargaining simply by omitting the word "effects" from its repeated requests to bargain. (GC Br. at 7–8) Additionally, the Union submits that Ms. Perry's request to bargain over "the Company's requirement to complete an I-9 above and beyond what is required by Federal law," (JX 19) is reasonably read as a request to bargain over the reverification as an effect of the I-9 Advantage roll-out. *Cf. Litton*, 286 NLRB at 818–20 (finding effects-bargaining obligation where layoff decision determined to be a bargainable effect of a non-bargainable plant conversion). Thus, even if Frontier had provided notice (which it did not) the Union timely requested effects bargaining by Ms. Perry's e-mail of August 8, 2019.

The Union also categorically rejects the Company's outrageous mischaracterization of the Union's motivations for raising legitimate concerns about the 2019 reverification process, which, the Company appears to argue, demonstrate that the Union's desire to bargain over the effects of the program was insincere.[4] (Exc. Br. at 11–12) The Company's description of Union's response to its wholesale reverification of the bargaining unit—what it called

[4] Frontier repeatedly argues that its compliance process was not a "re-verification" for the purpose of the IRCA, and that the Union therefore misunderstood Frontier's legal responsibilities. *See, e.g.* Exc. Br. at 19, n. 22. This disagreement is merely one example of how Frontier's intransigent refusal to bargain hampered the parties' good-faith resolution of the dispute. Frontier could have come to the table and raised this point. Instead, it rebuffed the Union at every turn, forcing it to seek a remedy from the Board.

"obstruction and interference" with its immigration compliance—is both factually unsubstantiated and legally irrelevant. Frontier claims that the Union "thwart[ed]" its effort, (Exc. Br. at 12), relying on the vague and conclusory testimony of a sole witness, Labor Relations Vice President Bob Costagliola. Mr. Costagliola asserted that CWA-represented employees did not cooperate with the reverification process at, he claimed, the direction of the Union. But he offered scant details of these unfounded accusations, stating only that he had "seen documents somewhere along the way . . . telling people not to cooperate." (Tr. 216:2–7) Mr. Costagliola did not directly attribute these unspecified "documents" to the Union, nor did he elaborate on their content.

From this meager evidentiary basis, the Company launched its inflated claims that the Union obstructed its I-9 compliance process and "never acknowledged Frontier's right and legal obligation" to obtain Form I-9 verifications for its employees. This latter claim is plainly belied by the 2013 Form I-9 compliance process, in which the Union and the Company reached a negotiated agreement over the same issue. It is also directly contradicted by Union Administrative Director Letha Perry's August 8, 2019 information request and bargaining demand, in which she made clear that the Union had "no objection to the Company complying with" federal immigration law. (JX 19; ALJD at 10) Additionally, the Company cites no evidence—and none exists in the record—to support its claim that CWA-represented employees "made up a significant and disproportionate percentage of the Non-Compliant Employees." (Exc. Br. at 12) Indeed, as Frontier Vice President Bob Costagliola testified, many of the deficiencies occurred because Frontier's managers and HR representatives conducting the 2013 reverification "botched it," accepting invalid identification, including hunting licenses and gun

licenses. (Tr. 212:5–20) These deficiencies were therefore not attributable to the affected employees or the Union.

From this deeply flawed argument, the Company draws a conclusion that tellingly reveals its profound misunderstanding of its obligation to bargain in good faith. As the Company put it, the Union's purported obstructionism was "inconsistent with a desire to engage in effects bargain[ing]—**a process that begins only after the underlying decision is implemented**." (Exc. Br. at 12, emphasis added) This argument stands on its head the well-settled rule that, absent exigent circumstances, an employer must afford a meaningful opportunity to bargain over the effects of a decision *before* that decision is implemented.[5] *See, e.g.*, *Comau, Inc.* 364 NLRB No. 48 (2016) ("To be timely, the notice must be given 'sufficiently before . . . actual implementation so that the union is not confronted at the bargaining table with . . . a fait accompli'") (quoting *Willamette Tug & Barge Co.*, 300 NLRB 282, 283 (1990)); *Naperville Jeep/Dodge*, 357 NLRB 2252, 2272 (2012), enfd. *Dodge of Naperville v. NLRB*, 796 F.3d 31 (D.C. Cir. 2015), cert. denied 136 S.Ct. 1457 (2016). Certainly, the Company is correct that the Union's communications during the relevant period were "inconsistent with a desire to engage in effects bargaining" on the terms the Company apparently thought were proper—that is, only *after* the compliance process was complete. (Exc. Br. at 12) Rather, the Union immediately demanded bargaining over specific effects of that compliance process on unit employees, including the extent to which previously provided verification documents would be deemed sufficient. (JX 5; JX 8)

[5] Curiously, the Company itself cites this proposition later in its brief. *See* Exc. Br. at 16 ([A]n employer may still be required to engage in bargaining over the effects of the decision 'in a meaningful manner and at a meaningful time.'") (citing *First National Maintenance*, 452 U.S. 666 (1981)).

**2. Reverification materially and substantially affected employees' terms and conditions of employment.**

The Administrative Law Judge properly rejected Frontier's argument, which it raises again before the Board, that the impact on employees of the Form I-9 reverification was not material and substantial. (ALJD at 18 n.12; Exc. Br. at 16–22). Frontier's manager, Peter Homes, described the completion of the form itself as "fairly quick and painless." (JX 12) But this misses the point: reverification involved more than just filling out a form, and the potential consequences for noncompliance were severe. From the outset, Frontier required employees to complete the electronic Form I-9 *and* to present work-status documents within a limited time period. (JX 3) *Cf. Washington Beef, Inc.*, 328 NLRB at 620 (designating time afforded to provide verification documents a mandatory subject of bargaining). For employees who did not have the required documents readily available, the requirement to reverify imposed a substantial burden. Indeed, Frontier tacitly acknowledged this burden when it mandated a wholesale reverification of the bargaining unit instead of reviewing employees' previously submitted documents (which, by then, were centrally located at its HR offices), thereby shifting much of the compliance burden onto its employees.[6]

Furthermore, noncompliance could lead to termination of employment—unquestionably a substantial consequence for the affected employees. (ALJD 18:10–14) On September 26, 2019, Union Administrative Director Letha Perry received a notification from Frontier manager Peter Homes that approximately 22 percent of the affected employees had not yet completed the first step in reverification under the I-9 Advantage process. (JX 21) Mr. Homes warned that

[6] Mr. Costagliola testified repeatedly that he was initially told that the reverification process was required "because we got this new software program and everyone had to submit data again," and that "everybody was going to provide fresh data for this new Advantage I-9 database." (Tr. 193:24–25; 222–23) While he later attempted to walk this back, this initial, unguarded testimony offers the most plausible explanation for the near-universal reverification: Frontier simply did not want to comb through its records to confirm employees' Form I-9 status, so it mandated that they resubmit them.

"[o]n or after October 4, 2019, the Company will begin to remove non-compliant employees from the work schedule," and "may treat their employment as **voluntarily terminated**." (JX 21 at 45, emphasis added) Mr. Homes characterized these removals as "nondisciplinary," but from the Union's perspective "[r]emoving people from their schedules and not paying them is disciplinary." (Tr. 83:1–2) Although no employees were subsequently discharged or removed from work, the Company's announcement of severe consequences for non-compliance demonstrates the direct impact of the reverification program and the timing and manner of its implementation on terms and conditions of employment. Thus, the Administrative Law Judge properly found that requiring employees re-verify or resubmit Form I-9s and supporting documents was a material and substantial change.

### 3. Frontier has not shown exigent circumstances that might excuse its failure to afford the Union notice and an opportunity to bargain.

Frontier has not presented any evidence that it faced exigent circumstances requiring the immediate implementation of its reverification plan. *Cf. Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) (finding an exception to the duty to bargain where "economic exigencies compel[led] prompt action."). To the contrary, after it initiated the reverification, Frontier "kept kicking that can down the road," postponing final implementation of the process (Tr. 142–43) Frontier Senior Vice President Bob Costagliola also testified that any compliance issues underlying Frontier's reverification process had existed for "a number of years" without being addressed, belying any emergency. (Tr. 192:19) And Frontier did not immediately begin removing employees for noncompliance, but instead issued several reminders and warnings over the ensuing months. This shows that implementation of the reverification was not an exigent requirement that the Company could implement without affording the Union notice and an opportunity to bargain.

### B. The information Frontier undisputedly failed to provide was material and relevant to the Union's representational duties.

The Administrative Law Judge properly found that Frontier was required to respond in good faith to the Union's requests for material and relevant information as a corollary to its obligation to bargain with the Union over the effects of its implementation of the I-9 Advantage system, it. (ALJD at 22) Frontier concedes that it did not provide the information the Union requested relating to the reverification process, but argues that this information was not relevant to any bargainable subjects. To the contrary, the record clearly establishes that the Union's requests were relevant, and that Frontier has not shown any circumstances that would justify its failure to provide the requested information.

An employer has a statutory obligation to provide requested information that is potentially relevant to a union's fulfillment of its responsibilities as the employees' exclusive bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). This duty to bargain "extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement." 385 U.S. at 486. The standard for relevancy is a ''liberal discovery-type standard,'' and the sought-after evidence need not be dispositive of the issue between the parties but, rather, only of some bearing upon it and of probable use to the labor organization in carrying out its statutory responsibilities. *Aerospace Corp.*, 314 NLRB 100, 103 (1994). Information concerning unit employees' terms and conditions of employment is ordinarily presumptively relevant and must be provided on request. *Iron Workers Local 207 (Steel Erecting Contractors)*, 319 NLRB 87, 90–91 (1995). And irrespective of its decisional bargaining rights in a given sphere, a union remains entitled to information relevant to its right to bargain over the effects of such a decision. *Comar, Inc.*, 339 NLRB 903, 912 (2003) (citing *Sea-Jet Trucking Corp.*, 327 NLRB 540 (1999)).

At issue before the Board are two of four information requests the Union made with respect to the I-9 Advantage rollout, all of which relate to the Union's attempt to confirm and clarify the scope of Frontier's Form I-9 reverification process. Frontier's reverification was originally advertised as affecting only "[c]ertain Frontier employees" hired between Nov. 6, 1986, and March 31, 2018, but was later described variably as affecting all employees in that group or an indeterminate subset who had deficient forms. (JX 3, JX 8 at 2, JX 10, JX 16, JX 18) On August 1, 2019, after she was unable to get a straight answer about the scope of the reverification process, District 2-13 Administrative Director Letha Perry requested two lists of bargaining-unit employees:

(1) those identified as having not completed an I-9; and

(2) those identified as having an incomplete or incorrectly completed I-9.

(JX 15)

Frontier's immigration counsel responded on August 8, challenging the Union's right to the information it requested but providing "as a courtesy," a list of the Company's West Virginia bargaining-unit employees for whom, it claimed, it lacked a completed Form I-9. (JX 18) On August 8, 2019, Ms. Perry requested two additional items of information:

(3) the specific deficiency for each incorrectly completed I-9; and

(4) the "current location and storage method of . . . our members previously completed I-9's and any accompanying documents."

(JX 19)

Frontier admits that it did not provide any of the information sought in items 3 and 4. (Tr. 157:19–23; 167:24–168:4)[7] The Administrative Law Judge properly found that Frontier was

[7] The Administrative Law Judge found that Frontier substantially complied with the August 1 request. Neither the General Counsel nor the Charging Party has excepted to this determination.

required to provide information responsive to both (ALJD at 22:11–20), a decision Frontier now challenges before the Board.

**1. The Union sought information that was material and relevant to its representation of employees with respect to the I-9 Advantage implementation.**

The Administrative Law Judge correctly found that Ms. Perry's requests for the specific deficiencies and current location and storage method for each purportedly deficient Form I-9 were clearly relevant to the Union's representational functions. The list Frontier provided on August 8, 2020, contained what appeared to Ms. Perry to be the names of roughly 95 percent of the bargaining unit. (Tr. 73:18–23) This raised serious concerns for Ms. Perry, who found it "highly unlikely that 95% of the required I-9's were completed incorrectly." (JX 19)

The Union was not required to take the Employer's representation as to the scope of the deficiencies at face value—its right to bargain includes the right to independently verify Frontier's claims by seeking the underlying data supporting those representations. *See Metro Foods*, 289 NLRB 1107, 1118 (1988). Frontier was unquestionably aware of this basis for the Union's request, because Ms. Perry shared it with Peter Homes at the time the requests were made. (JX 19) The scope of deficiencies in employee documentation was also relevant to the Union's pursuit of individual grievances relating to the reverification process, several of which remain pending. (Tr. 144:9–13) Also, if the Union accepted at face value Frontier's representation that nearly all of the employees' I-9 forms (including those reverified in 2013) and the associated verification documents were either missing or otherwise deficient, this reasonably suggested that Frontier had misplaced or otherwise lost control of employees' sensitive personal information on a massive scale. (Tr. 47–48) Ms. Perry knew that some employees had been required to provide copies of these documents as part of the 2013 reverification. And Frontier's broadly distributed operation, in which many employees were supervised remotely, made it

reasonable to assume that some employees would be directed to e-mail or otherwise electronically submit copies of their verification documents, further compounding security concerns.

This risk to employee personal data was a significant issue that the Union could have addressed in effects bargaining over Frontier's reverification process. The Union's concern about data safety—which has never been resolved because of Frontier's refusal to bargain—independently justified the Union's fourth enumerated request seeking the location and storage method for each purportedly deficient record. Thus, the information Frontier refused to provide was material and relevant to its representation of the bargaining unit.

**2. Frontier's assertion that the Union sought specific deficiency information to challenge individual compliance determinations is not supported by the record.**

Frontier argues to the Board that the Union "candidly admitted" seeking the specific deficiencies for each Form I-9 "to challenge—on an employee-by-employee basis—the specific compliance determinations made by the Company" and that the "ALJ acknowledged the Union's purpose . . . was to challenge Frontier's audit conclusions." (Exc. Br. at 24) Frontier's characterization here is completely untethered from the actual text of the ALJ's decision, which in no way supports this claim. (ALJD 22 n. 17) Its characterization of the Union's position reflects a similarly radical departure from the record.

Indeed, Frontier's unproven claim that the information sought was intended to support amassive adjudication of compliance determinations presupposes that the *result* of bargaining over the effects of its compliance program would have been such an individualized review process. But neither the Board nor the Union have the power to compel Frontier to accept such an outcome—the duty to bargain gets the parties to the table but does not prescribe any particular result. *See Barry-Wehmiller Co.*, 271 NLRB 471, 472 (1984) ("[T]he Board does not, either

directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements, absent unusual circumstances."). Or, as Frontier's counsel succinctly put it, "there's no formula for bargaining." (Tr. 86:15–16)

Moreover, Frontier's alarmist predictions are not borne out by the history of the parties in bargaining over the Form I-9 reverification in 2013. There, Frontier and the Union resolved the matter in a single bargaining session. Frontier agreed to safeguards that would protect employee privacy and allow adequate opportunity for unit employees to obtain and present documents. In exchange, the Union agreed to encourage members to participate in the reverification process. (Tr. 185–87; JX 5 at 2) Thus, Frontier and the Union already had a roadmap for what Senior Vice President Bob Costagliola considered a "reasonable approach" to effects bargaining, one that eased the burden on employees while also facilitating the compliance Frontier sought. (Tr. 231:18–25) Frontier's suggestion that a radically different and more burdensome result would obtain this time is mere unsubstantiated speculation that cannot justify its failure to bargain over the reverification process or to provide the information the Union sought pursuant to that bargaining obligation.[8]

Here, the effects bargaining process could have yielded many results that did not require the individualized determinations Frontier presupposes. For example, as Ms. Perry testified, one outcome of effects bargaining could have been sorting employees by the type of deficiencies and resolving those issues in groups or classes. (Tr. 150–51) But because the Employer did not meet its obligation to bargain over the effects of its adoption of the I-9 Advantage system, one cannot say now what that process would have produced. Thus, Frontier cannot rely on a single hypothetical outcome to show that the information sought was not relevant to a proper purpose.

[8] Frontier's reliance on a memorandum from the Division of Advice (Exc. Br. at 25) is misplaced. This Advice Memorandum represents the legal reasoning of the former General Counsel and is not binding on the Board.

### 3. Frontier has not timely raised impossibility or undue burden defenses, which in any event are not supported by the record.

Frontier also suggests that it could not produce information regarding specific deficiencies for each purportedly non-compliant employee, which the Union sought in its August 8 request.[9] (Exc. Br. at 24) This defense should be rejected as untimely and not supported by the evidence. A party seeking to avoid providing information on the basis of undue burden must assert that claim within a reasonable period after the request is received. *J.I. Case Co. v. NLRB*, 253 F.2d 149 (7th Cir. 1958). And though it cannot be held liable under the Act for failing to produce information it does not have, an employer must make reasonable efforts to secure any unavailable information and, if unavailable, explain or document the reasons for the asserted unavailability. *Rochester Acoustical Corp.*, 298 NLRB 558, 563 (1990). At the hearing in this matter, Frontier's counsel inquired of Union Administrative Director Letha Perry whether, to her knowledge, the Company had the ability to produce deficiencies on an employee-by-employee basis. (Tr. 139) This hearing was the first time anyone from Frontier had suggested that the information the Union sought might be unavailable or unduly burdensome to produce. (Tr. 240:14–22) Ms. Perry did not know the answer (nor would she be in a position to know this), but no one from Frontier ever told her that it was unable to provide the information sought. (Tr. 152)

To the contrary, Frontier representative Peter Homes admitted that the Company did have the capability to provide employee-by-employee deficiency data in his October 21 letter to the Union:

> If there is a request to review a specific personnel file in connection with an I-9 grievance, we will provide for such review consistent with Article 6A of the CBA. If there is a request to review a specific Form I-9 in connection with a Form I-9 grievance,

[9] Frontier's brief does not raise a similar defense with respect to the fourth enumerated request: the "current location and storage method of . . . our members previously completed I-9's and any accompanying documents."

> **we will provide a copy of the Form I-9 on file, if any**. **We will also provide an explanation of the deficiency with the current Form I-9, if any**.
>
> [JX 23, emphasis added]

Because Frontier failed to timely raise impossibility or undue burden, it cannot now assert these defenses, which are in any event contradicted by the representations of its own manager, Peter Homes. The Board should therefore reject this argument.

### C. The appropriate remedy for Respondent's unfair labor practices includes providing the requested information to the Union.

Frontier also challenges the Administrative Law Judge's recommended remedy, which includes providing the Union, upon request, with the specific deficiencies, storage method and location for each bargaining-unit member's previously completed (pre-2019) I-9 forms. (ALJD 23–24) This information is required before meaningful effects bargaining can occur. *See Miami Rivet of Puerto Rico*, 318 NLRB 769, 771–72, 773 (1995) (finding that the refusal to provide relevant information "precluded meaningful effects bargaining" and ordering the company to both provide the information and effects bargain upon request).

The Board's framework for determining whether a requesting union is entitled to information sought as a remedy for an unfair labor practice was recently clarified in *Boeing Co.*, 364 NLRB No. 24 (Jun. 9, 2016). There, the Board observed:

> The employer bears the burden to prove that the union has no need for the requested information. *Borgess Medical Center*, [342 NLRB 1105, 1107 (2004).] Where the employer has demonstrated that the original, stated need for the information is no longer present, the General Counsel or the union . . . must articulate a present need for the information. *See Finley Hospital*, 362 NLRB No. 102, slip op. at 10 (2015) (ordering production of information only "if the Union articulates a present need for this information").
>
> * * *
>
> If a respondent, based on evidence available before or during the merits hearing before the administrative law judge, wishes to argue that production should not be

> ordered because the union has no need for the information, the respondent must introduce the relevant evidence during the merits hearing and argue the issue to the judge. The judge should permit the General Counsel and the charging party to contest the respondent's claim or to state an ongoing need for the requested information and to introduce evidence accordingly. . . . If evidence that the union has no need for the information first becomes available after the merits hearing has closed, the respondent may raise the issue in the compliance stage of the case. . . . The burden of proof to establish that the information is no longer needed remains with the respondent.
>
> [*Boeing*, slip op. at 4–5]

Frontier did not challenge the Union's present need for the information, either as an affirmative defense in its answer or in its brief to the Board. (GCX 1(e) at 3–4; Exc. Br. 23–25) Nor has it provided any evidence that would demonstrate that the information is no longer needed. Thus, under *Boeing*, it has not met its burden of proof to show that the information is no longer needed.

Notwithstanding Frontier's failure to appropriately raise this issue, the information sought by the Union remains necessary to ensure the efficacy of any effects bargaining ordered as a remedy here. Although it appears that most of the affected employees have complied with the reverification process initiated in 2019, Frontier's history of repeatedly reverifying employees' immigration status would reasonably lead the Union to bargain prospective standards for employee reverification. For example, understanding the actual Form I-9 deficiencies that led to Frontier's near-universal reverification process (which have never been satisfactorily explained) would be relevant to the Union's formulation of proposals for reasonable restrictions on the circumstances that could trigger future reverification processes. The Union might also seek to bargain for a less-burdensome alternative method for resolving Form I-9 discrepancies depending on the type of deficiency and whether Frontier retained valid working papers for those individuals. Similarly, if the information obtained showed that Frontier's representations regarding widespread deficiencies were inaccurate, the Union might formulate proposals aimed

at third-party verification of future deficiencies (for example, by an arbitrator) under certain circumstances.

Moreover, Frontier's representation that it did not have correctly completed Form I-9s for roughly 95 percent of the bargaining unit (JX 15)—even though it completed a reverification in 2013 that involved in many instances retaining copies of employees' verification documents—gave rise to a reasonable concern that employees' sensitive documents had not been properly safeguarded and may have been compromised. Frontier has never addressed this issue with the Union, nor did it offer any evidence at the hearing as to the location and method of storing the Form I-9 documents collected prior to the transition to I-9 Advantage. The security of bargaining-unit members' sensitive personal information is therefore an ongoing concern to which the information sought by the Union remains relevant.

This is by no means an exhaustive description of the potential uses for the information sought as a remedy in this case, but it underscores the Union's continuing interest in the information requested. Thus, while the Union maintains that Frontier neither timely raised this issue nor met its burden of proof, it nonetheless submits that its ongoing need for the information it requested necessitates an order to provide that information as part of an appropriate remedy in this case.

## III. CONCLUSION

Wherefore, Communications Workers of America, District 2-13 urges Board to affirm and adopt the Administrative Law Judge's Decision and recommended Order forthwith.

Dated: January 22, 2021

Respectfully submitted,

Willig, Williams & Davidson

/s/ Joseph D. Richardson

Joseph D. Richardson, Esq.

WILLIG, WILLIAMS & DAVIDSON
1845 Walnut Street, 24th Floor
Philadelphia, PA 19103
215-656-3655 phone
215-561-5135 facsimile
jrichardson@wwdlaw.com

**CERTIFICATE OF SERVICE**

I hereby certify that on January 22, 2021, I served counsel for Respondent and counsel for the General Counsel with the Union's Post-Hearing Brief by e-mail per 29 C.F.R. § 102.5(f).

Dated: January 22, 2021 /s/ Joseph D. Richardson

Joseph D. Richardson, Esq.

WILLIG, WILLIAMS & DAVIDSON
1845 Walnut Street, 24th Floor
Philadelphia, PA 19103
215-656-3655 phone
215-561-5135 facsimile
jrichardson@wwdlaw.com